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No. 02-342

IN THE

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION, AND SCHERING CORPORATION,

Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Did Oregon violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by allowing duplicative multi-million dollar punitive damages awards to be imposed on petitioners (a) for the same effects of the same course of conduct and (b) for extraterritorial effects of nationwide conduct?

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INTEREST OF THE AMICUS CURIAE [1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing more than 100 research-intensive companies

[1] In accordance with Rule 37.2(a) of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent, accompanying this brief, have been filed with the Clerk of the Court.

In accordance with Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

engaged in the discovery and development of prescription pharmaceutical products. PhRMA member companies produce the vast majority of the prescription medicines used in the United States. They annually invest more than $8 billion in research and development. This substantial private research effort is the source of virtually all new drugs marketed in the United States.

The threat and actual awards of disproportionate, excessive, and duplicative punitive damages against pharmaceutical manufacturers are compromising the industry's research efforts and depriving Americans of significant pharmaceutical therapies. In important areas such as childhood vaccines and drugs for pregnant women, liability concerns already have had a demonstrable negative impact both on research and on the continued availability of beneficial products to the people who need them. *See generally* Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L.J. 693 (1990).

The development and distribution of new drugs have been compromised to an unusual extent by the recent explosion in punitive damages awards. Research and development are expensive, time-consuming tasks. Despite extensive testing and exacting regulation by the federal government, full knowledge of the risks presented by new drugs can never be gained prior to marketing and widespread use. In addition, all drugs are associated with adverse events in some patients. These harms cannot be avoided, regardless of the degree of care exercised by researchers and manufacturers; and, as this case illustrates, they give rise to large punitive damages awards. *See generally* Kuhlik & Kingham, *supra*.

PhRMA hopes that this additional perspective will assist the Court in developing constitutional standards that limit the award of punitive damages.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an ideal vehicle to correct a pervasive and clearly unconstitutional practice that has become routine in Oregon and numerous other jurisdictions in awarding punitive damages: the imposition of duplicative punitive damages awards against the same defendant for the same effects of the same course of conduct. Although many lower courts have expressed grave reservations about the fairness and constitutionality of the practice, those courts are inherently incapable of fashioning a remedy because no lower court can bind all the other courts that award punitive damages. Only this Court can prevent the recurring constitutional violations.

Courts across the country are imposing repetitive punitive damages awards against the same defendant for the same effects of the same course of conduct, including punitive damages for effects occurring beyond the borders of the States where they are located. Under the current regime, a defendant may be subjected to punitive damages liability for the same effects of the same act or course of conduct multiple times in Oregon courts and again multiple times in courts in other States that permit punitive damages (the overwhelming majority). The record here clearly presents in one case duplicative punitive awards that punished petitioners for the very same effects of a single course of conduct nationwide in scope and effects.

After awarding $35 million in punitive damages to an injured patient, Paul R. Bocci, on the basis of petitioners' national marketing campaign for its theophylline drug, Theo-Dur, the jury awarded to Mr. Bocci's treating physician, Dr. Frederick D. Edwards, $22.5 million in punitive damages based on precisely the same evidence relating to petitioners' national marketing campaign for Theo-Dur. Mr. Bocci and Dr. Edwards had each sought a punitive award of up to $35 million, on the ground that that figure represented the loss

petitioners had sought to avoid by means of their national marketing campaign, *see* Trial Tr. 3885-88; Trial Exs. 66, 70, 28; and the trial court had instructed the jury that it could not award more than $35 million to either claimant on the basis of that evidence. *See* Trial Tr. at 4308. The instructions and verdict forms, however, plainly permitted the jury to award up to $35 million in punitive damages twice. *See* App. 124, 130.

The $22.5 million award against petitioners is precluded by the Due Process Clause of the Fourteenth Amendment to the Constitution on two separate grounds. First, it overlaps, in its entirety, with the $35 million punitive damages award to Mr. Bocci. Second, the $22.5 million punitive award punishes petitioners for effects of their conduct that occurred outside of Oregon.

Punitive damages are a quasi-criminal sanction intended not to compensate plaintiffs but to fulfill the public's interest in retribution and deterrence. As this Court's punitive damages jurisprudence has made clear, punitive damages cannot constitutionally exceed that amount necessary to punish the defendant and to deter future wrongdoing. Excessive and disproportionate punitive awards deny due process. Once a defendant has been fully punished for the effects of a given course of conduct, a second award based on the identical effects of the identical course of conduct necessarily exceeds the amount required to satisfy society's interest in punishment and deterrence. Thus, duplicative awards are inherently excessive and disproportionate.

This Court has cautioned States against punishing defendants on the basis of injuries occurring beyond their borders. The Court also has repeatedly emphasized that, in imposing punitive damages, the primary inquiry should be directed to the defendant's conduct *vis-à-vis the particular plaintiff* before the court. The Due Process Clause should be inter-

preted to prevent the injustice of multiple punitive awards against the same defendant for the same effects of the same course of conduct.

To avoid punishing a defendant repeatedly for the same in-state effects of the defendant's conduct, state courts would have at least two options. A State could vindicate its interest in retribution and deterrence by (1) permitting each plaintiff (or class of plaintiffs) to recover from a particular defendant only for injuries to it (or them) occurring in the State from that defendant's course of conduct, or (2) permitting the first plaintiff receiving a punitive award to recover for all in-state effects of the defendant's course of conduct and barring all subsequent punitive awards based on in-state effects of that conduct.

ARGUMENT

DUPLICATIVE AWARDS OF PUNITIVE DAMAGES FOR IDENTICAL INJURIES OR OTHER EFFECTS RESULTING FROM THE SAME COURSE OF CONDUCT DENY DUE PROCESS OF LAW.

Punitive damages are not imposed to compensate an injured plaintiff, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); and no particular plaintiff has any "right" to a punitive damages award. *See, e.g., Smith v. Wade*, 461 U.S. 30, 52 (1983) (punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct"). Indeed, recognizing that no given plaintiff is entitled to an exemplary award, Oregon requires that sixty percent of a punitive recovery be remitted to the State. *See*

Or. Rev. Stat. § 18.540 (2001); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (en banc).[2]

Only plaintiffs who presumptively receive full compensation can also receive punitive damages. *See City of Newport*, 453 U.S. at 267 (punitive damages "are assessed over and above the amount necessary to compensate the injured party"); *Smith*, 461 U.S. at 59 (Rehnquist, J. joined by Burger, C.J., and Powell, J., dissenting) ("by hypothesis [plaintiff] is fully compensated"). Thus, a plaintiff who receives a punitive damages award receives a windfall, which is tolerated in order to achieve the societal goals of punitive damages. *See City of Newport*, 453 U.S. at 267.

Punitive damages are a quasi-criminal sanction. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). They are imposed to vindicate the public's interest in "punish[ing] the defendant and . . . deter[ring] future wrongdoing." *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz*, 418 U.S. at 350.

Under Oregon law, as under the common law generally, each award of punitive damages that becomes final presumptively punishes the defendant fully for its wrongful conduct. Juries are not instructed to punish a defendant partially.

For example, Oregon juries are directed to consider "[t]he sum of money that would be required to discourage the defendant and others from engaging in such [wrongful] conduct in the future." Oregon Uniform Civil Jury Instructions 75.02A (2001). In this case, the jury did not receive that

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[2] Other States have enacted similar statutes. *See, e.g.*, 735 Ill. Comp. Stat. 5/2-1207 (2002); Iowa Code § 668A.1(2)(b) (2001); Mo. Rev. Stat. § 537.675(3) (2001); Utah Code Ann. § 78-18-1(3) (2002).

instruction, but the instruction it did receive did not suggest that it should impose anything less than full punishment.

In other jurisdictions, juries are instructed similarly to impose punitive damages "in an amount sufficient to fulfill their purposes [to punish and to deter]," Ninth Circuit Manual of Model Civil Jury Instructions § 7.5 (2001), or an amount that may be "as large as you believe necessary to fulfill the purposes of punitive damages," Fifth Circuit Pattern Jury Instructions: Civil Cases § 15.13 (1999), or "in such amount as in your sound judgment and discretion you find will punish the defendant for what (he, she, it) did and will deter the defendant and other (people, companies)." New York Pattern Jury Instructions—Civil 2:278 (2002).

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), where the Court upheld a punitive damages award against a due process challenge, the Alabama jury was instructed that it should award punitive damages, if at all, "'to punish the defendant,'" and that "'in fixing the amount [of the punitive award], you must take into consideration the . . . necessity of preventing similar wrong.'" 499 U.S. at 6 n.1 (quoting instructions). An amount less than the sum necessary fully to punish the defendant and to deter the defendant and others would not satisfy such instructions.

A jury following such instructions—and juries are presumed to follow the instructions given them, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001)—will award an amount it determines will fully effectuate the goals of punishment and deterrence. Moreover, the instructions are likely to be reinforced by counsel's argument, as they were in this case. *See* p. 19, *infra*. Plaintiffs certainly have no incentive to argue that the jury should impose anything other than full punishment. Although defendants can be expected to argue that no punitive damages are warranted and that a relatively small award would suffice to satisfy the goals of punishment

and deterrence, defendants would not urge jurors to punish them by an amount that would not suffice.

Some courts have suggested that defendants can reduce the harm from duplicative punitive damages awards by introducing evidence of prior such awards against them and arguing that they should mitigate any need for, or reduce the amount of, any additional award. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1273-74 (Or. 1980). This remedy fails to remove the constitutional flaw and is also impracticable. Even if the jury reduces the amount of the punitive damages award in light of prior awards based on the same effects of the same conduct, whatever amount the jury does award is still duplicative. Moreover, defendants commonly decline to introduce such evidence (which plaintiffs' lawyers could exploit). *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1384 (3d Cir. 1993) (en banc); *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994); *Unified Sch. Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. 1981).

Under the Due Process Clause of the Fourteenth Amendment, once a State has levied a punitive award against a defendant for a given set of injuries and other effects (actual and/or potential) of an act or course of conduct, it should not be permitted to make a second punitive award for that same set of effects of that act or conduct. Due process demands of all judicial proceedings fundamental fairness. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). Fundamental fairness forbids repeated litigation between the same parties in regard to the same subject of controversy. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (owner of property that could be escheated by two States "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment").

It is beyond debate that a civil plaintiff could not recover twice from the same defendant compensation for the same injury caused by the same act or course of conduct. *See, e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) ("In civil cases[,] . . . no man shall be twice vexed for one and the same cause."). It also is clear that the same plaintiff could not recover from the same defendant duplicative punitive awards for the same effects of the same conduct. *See, e.g.*, *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 218-19 (3d Cir. 1992) (same principle that bars duplicative compensatory recovery bars duplicative punitive award); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1284 (8th Cir. 1981) (award of statutory treble damages and punitive damages barred because duplicative); *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992) (en banc) (same); *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 367 (Tex. 1988) (same); *Stoner v. Houston*, 582 S.W.2d 28, 31 (Ark. 1979) ("double punitive recover for the same illegal act . . . is prohibited"); *John Mohr & Sons, Inc. v. Jahnke*, 198 N.W.2d 363, 368 (Wis. 1972) ("Two penalties on the same or different theories for the same act violates basic fairness and thus due process of law.").

For precisely the same reasons, two different plaintiffs should not be permitted to recover from one defendant duplicative punitive awards for the same injuries or other effects resulting from the same conduct.[3] The identity of the party obtaining the second punitive award is immaterial. Unlike a plaintiff seeking compensatory relief, a plaintiff seeking a punitive award has no entitlement to the award beyond that necessary to vindicate the *public* interests in punishment and deterrence. *See* pp. 5-6, *supra*. Once the first plaintiff has won from the defendant a punitive award that,

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[3] In Oregon and in States with similar statutes allocating a portion of punitive damages to the State, the State may recover from one defendant duplicative awards based on the same effects of the same conduct.

under the evidence and instructions that led to it, is, with respect to the effects of the defendant's conduct, deemed sufficient to punish the defendant and deter future wrongdoers, no legitimate public purpose is served by permitting a second or subsequent plaintiff to win a further punitive award from the same defendant for the same effects of the same conduct.

No principled basis exists for exempting duplicative awards of punitive damages from the long-standing prohibition against imposing duplicative judgments on the same party for the same claim. To the contrary, the logical conclusion of this Court's due process jurisprudence is that imposing on a defendant repetitive punitive awards for the same effects of a single act or course of conduct denies due process.

This Court has held that, to satisfy the Due Process Clause, punitive damages must be no "greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Excessive and disproportionate punitive awards—awards that go beyond the level necessary to punish and deter—violate the Due Process Clause. *See Gore*, 517 U.S. at 568; *cf. id.* at 576 n.24 ("The principle that punishment should fit the crime is 'deeply rooted and frequently repeated in common-law jurisprudence.'") (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)). States "have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 349.

When one punitive damages award presumptively imposes full punishment on the defendant for certain effects of certain conduct, another award, for the same effects of the same conduct, is necessarily "greater than reasonably necessary to punish and deter" the defendant. *Haslip*, 499 U.S. at 22. A duplicative award is inherently excessive and disproportionate and serves no legitimate governmental interest. *See Gertz*, 418 U.S. at 349. The Due Process Clause protects

against "sanctions which are downright irrational." *Hudson v. United States*, 522 U.S. 93, 103 (1997). Duplicative punitive damages awards are "downright irrational." *Id.*

Numerous lower courts have questioned the constitutionality of duplicative punitive awards. *See, e.g.*, *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (expressing "misgivings" that binding precedent required the court to reject defendant's argument that imposition of multiple punitive awards denies due process); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728 ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act. . . . Certainly the principle of res judicata, the notion that

litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *see also In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims[] would violate the sense of 'fundamental fairness' that is essential to constitutional due process.").

Judge Higginbotham summed up the constitutional conundrum facing lower courts:

> Each jury has before it only one case—it is the aggregate effect of several juries' faithful adherence to the law that poses risk of ultimate destruction. . . . And the premise . . . is that [the] private interests of a plaintiff and the public are parallel. The rub, however, is that after the first award of exemplary damages, that parallelism is lost.

Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd*, 623 F.2d 1367 (5th Cir. 1980), *aff'd in part & vacated & remanded in part on other grounds*, 665 F.2d 1367 (5th Cir. 1982) (en banc).

The lower courts (including federal courts exercising diversity jurisdiction), however, have been powerless to craft a workable solution because they cannot impose one nationally.

> "[S]ingle-state action . . . is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims,

> a situation that hardly provides much law reform incentive for state legislators."

Dunn, 1 F.3d at 1386 (emphasis omitted) (quoting 2 American Law Institute, *Enterprise Responsibility for Personal Injury* 261 (1991)); *see W.R. Grace & Co.—Conn.*, 638 So.2d at 505 ("We acknowledge the potential for abuse when a defendant may be subjected to repeated punitive damage awards arising out of the same conduct. Yet, like the many other courts which have addressed the problem, we are unable to devise a fair and effective solution. Were we to adopt the position advocated by [the defendant], our holding would not be binding on other state courts or federal courts.");[4] *cf. McDermott v. Kan. Pub. Serv. Co.*, 712 P.2d 1199, 1203 (Kan. 1986) ("whether punitive damages may be recovered in a second action between different plaintiffs and the same defendants must be determined on a case-by-case basis").[5]

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[4] *W.R. Grace & Co.—Conn.* pre-dates a Florida statutory provision that (unsuccessfully) attempts to resolve the problem of multiple punitive awards. *See* n.5, *infra*.

[5] Several States have enacted statutes to reduce the incidence of multiple awards of punitive damages for the same effects of the same conduct by the same defendant. *See, e.g.*, Fla. Stat. Ann. § 768.73(2)(a) (West 2002); Mo. Rev. Stat. § 510.263(4) (2001); Act of June 5, 2002, ch. 462, sec. 1, 2002 Okla. Sess. Law Serv. 462 (West) (to be codified at Okla. Stat. tit. 23 § 9.1(C)). Such statutes cannot resolve the constitutional problem of duplicative awards unless all fifty States—not just a handful—enact them. Moreover, the existing statutes do not remedy the constitutional defects of duplicative awards insofar as they do not prohibit all duplicative awards for the same effects of the same conduct. *See, e.g.*, Fla. Stat. Ann. § 768.73(2)(a) (allowing duplicative punitive award in subsequent action upon court finding that a punitive award imposed in prior action was insufficient); Mo. Rev. Stat. § 510.263(4) (granting court discretion to give defendant credit for prior punitive awards for the same conduct, but allowing court to deny credit based, *inter alia*, on whether the defendant "unreasonably continued the [wrongful] conduct after acquiring actual knowledge of the dangerous nature of such conduct"); § 1, 2002 Okla. Sess. Law Serv. 462 (providing for reduction—but not

Indeed, this kind of permissive system reigns in Oregon, whose highest court answered in the negative the question "whether, after punitive damages have been awarded in one case, a judge may remove punitive damages from the jury's consideration in all subsequent cases involving the same set of defendants and arising from the same continuing wrongful act." *Crookham*, 618 P.2d at 1270. Subsequent Oregon juries may consider prior awards, but are not barred from imposing additional awards on a defendant that has already been fully punished by a punitive award for the totality of the effects of its conduct. *See id.* at 1273. This aspect of Oregon's punitive damages jurisprudence cannot be squared with the Due Process Clause.

Surely, there must be some means to prevent duplicative punitive damages awards in violation of the Due Process Clause. The current absence of such a means reflects the inability in our federal system of individual States and lower federal courts to bring about a fair and uniform national system. Intervention by this Court under the Due Process Clause is necessary for that. Two bedrock principles readily discernable in the Court's constitutional jurisprudence, if faithfully applied by state and lower federal courts, would greatly reduce the risk of future due process violations resulting from duplicative punitive awards.

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elimination—of subsequent awards based on the same conduct punished by prior awards by Oklahoma—but not other State—courts); *see also* n.6, *infra*. Finally, several such statutes have been repealed or held unconstitutional. *See, e.g.*, *McBride v. GMC*, 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (holding unconstitutional on federal and state equal protection and due process grounds section 51-12-5.1(e)(1) of the Georgia Code, which prohibited duplicative awards, but only in product liability cases); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999) (holding that provision requiring reduction of punitive damages based on prior punitive verdicts violated the State constitutional right to jury trial).

First, one State lacks the power to "enact . . . a policy for the entire Nation," or to "impose its own policy choice on neighboring States." *Gore*, 517 U.S. at 571. "[T]he Constitution has a 'special concern . . . with the autonomy of the individual States within their respective spheres.'" *Id.* at 571-72 (quoting *Healy v. Beer Inst.*, 491 U.S 324, 335-36 (1989)).

This long-standing constitutional safeguard of State sovereignty precludes a State from imposing policies to punish or to deter on the basis of injuries or other effects occurring in other jurisdictions, regardless of whether the underlying conduct is lawful or unlawful in those jurisdictions. *Cf. id.* at 572-73. A State that reaches out to punish for extraterritorial effects of conduct effectively precludes other jurisdictions from deciding whether any punitive damages for such conduct are warranted and, if so, the appropriate amount for injuries and other effects within their borders. Moreover, the overreaching State virtually ensures that, should other States choose to award punitive damages for that same conduct based on effects within their borders, they will be imposing a duplicative award on the defendant. Thus, in awarding punitive damages, States should constitutionally be limited to punishing and deterring for injuries or other effects that occur within their own borders. By requiring all States to confine their punitive sanctions to effects within their borders, this Court would eliminate the multiple overlapping punitive awards that plague our system across state boundaries.

Second, within its own borders, each State should be precluded from imposing on a defendant duplicative punitive awards for the same effects of the same conduct. Under the approach suggested here, a State, acting through its legislature or courts, would have at least two options for preventing unconstitutional duplicative awards.

A State could limit each punitive damages award against a particular defendant for a particular act or course of conduct

to the effects of that act or conduct on the particular plaintiff(s) before the court. This option would permit multiple punitive damages awards for the same general course of conduct, but not for the same effects of that conduct: each plaintiff who meets the requirements for punitive damages could receive punitive damages, but only for that plaintiff's own injury. That limitation would restrict the plaintiff's evidence and argument, and would be reflected in the jury instructions.

The roots of this option lie in this Court's punitive damages jurisprudence. In prior punitive damages cases, even while considering conduct toward others as a possible aggravating factor, this Court has been careful to focus on the defendant's conduct with respect to the specific *plaintiff(s)*. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court emphasized the "potential loss to respondents" resulting from the petitioners' misconduct toward them. *Id.* at 462. Similarly, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court emphasized the absence of "aggravating factors associated with particularly reprehensible conduct" with respect to the "purely economic" "harm BWM inflicted on Dr. Gore." *Id.* at 575-76. Again, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court focused on the potential harm to *the plaintiff* from the defendant's misuse of a photograph of the tool the plaintiff had invented. *Id.* at 442-43. Moreover, each time the Court assesses the ratio between a compensatory award and a punitive award as an indicium of excessiveness, the Court necessarily focuses on the harm suffered by the specific plaintiff. *See, e.g., Gore*, 517 U.S. at 575 (inquiring into "the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award").

The Court's focus on the specific plaintiff before it is not merely longstanding judicial practice and sound judicial

policy. Limiting the basis for the defendant's punishment to effects on the specific plaintiff(s) serves to limit the basis of the award to effects within the State as to which the defendant has not otherwise been ordered to pay punitive damages. The specific focus thereby protects the defendant from duplicative awards potentially far in excess of what is necessary to punish and deter.

Alternatively, a State could allow the first punitive damages award to cover all effects the defendant's act or course of conduct caused in the State, but would have to bar any further award to any other plaintiff based on any such effects. A State might conclude that the disadvantages of a race to judgment might be sufficiently reduced by joinder or class actions, and would be outweighed by the opportunity for an award of full state-wide punitive damages in a single proceeding. In appropriate circumstances, of course, punitive damages may be supplemented by criminal prosecution.

The prohibition of duplicative punitive awards against the same defendant for the same effects of the same conduct would apply without regard to the specific amount of any particular award. As a matter of law, the first award for a particular set of effects that becomes final fully vindicates the State's interest in punishment and deterrence with respect to those effects, and any further such award with respect to those effects is constitutionally excessive, no matter the amount of the final award or the potential amount of any prospective further award. The finality of the first award warrants the presumption that it was based on a fair trial of an actual controversy, in which, *inter alia*, the evidence was adequate and the jury instructions were correct. A subsequent award premised on a finding that an earlier award for the same effects was insufficient would deny due process.

This prohibition of duplicative awards would supplement, not supplant, the type of review for excessiveness adopted by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996). That type of review would continue to apply to initial awards of punitive damages for specified effects. The prohibition would apply only to duplicative awards for the same effects.

The Oregon courts in this case adopted no such limiting principle. The jury here awarded Mr. Bocci $35 million in punitive damages from petitioners based on the nationwide effects of petitioners' nationwide marketing campaign, and then awarded Dr. Edwards $22.5 million in punitive damages for precisely the same effects of the same conduct. The trial court acknowledged that Dr. Edwards's claims against petitioners were largely identical to Mr. Bocci's. *See, e.g.*, Trial Tr. 4272, 4279. Yet in the jury instructions and, even more plainly, in the verdict forms given to the jury—which permitted the jury to make awards of up to $35 million in punitive damages to Mr. Bocci *and separately* to Dr. Edwards, *see* App. 124, 130—the trial court permitted the jury to impose duplicative awards.

The $22.5 million award would have been duplicative even if it and the $35 million award had been based solely on effects occurring in Oregon. Indeed, under Oregon law, there is nothing to stop a future Oregon plaintiff from seeking yet another punitive damages award for the very same effects of petitioners' conduct.[6]

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[6] Under Oregon law, in a product liability case, one of the criteria on which punitive damages, if any, shall be awarded is

> [t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

Or. Rev. Stat. § 30.925(2)(g) (2001). Both section 30.925(2)(g) and, in limited circumstances, section 18.537 give discretion to avoid duplicate awards, but neither statute precludes such awards. Neither prevents a later jury or court from finding inadequate a punitive award that an earlier jury

In this case, the punitive damages are even more offensive to due process because they are based on nationwide effects of nationwide conduct. Dr. Edwards' counsel invited the jury to punish and to deter petitioners for the nationwide effects of petitioners' conduct. Counsel discussed the effects of petitioners' nationwide marketing campaign on "doctors in this country" and "American doctors," Trial Tr. 4070, 4099, and asked the jury to "put a stop to a number of these tragedies in this country." *Id.* at 4266. In view of the bases for the two punitive awards in this case, insofar as any other State permits a punitive award for effects of the same conduct, petitioners would be subjected to even further duplicative awards of punitive damages.

In sum, this case presents the opportunity for the Court to address two issues—whether the Due Process Clause permits a single State to impose duplicative punitive damages awards for the same effects of a single course of conduct, and whether the Due Process Clause permits States to award punitive damages for the extraterritorial effects of conduct.

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and court found adequate, and neither gives "credit" for prior exoneration with respect to punitive damages liability. *See id.* § 30.925(2)(g); Or. Rev. Stat. § 18.537(3) (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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